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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 313

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD.,
Plaintiffs in Error,

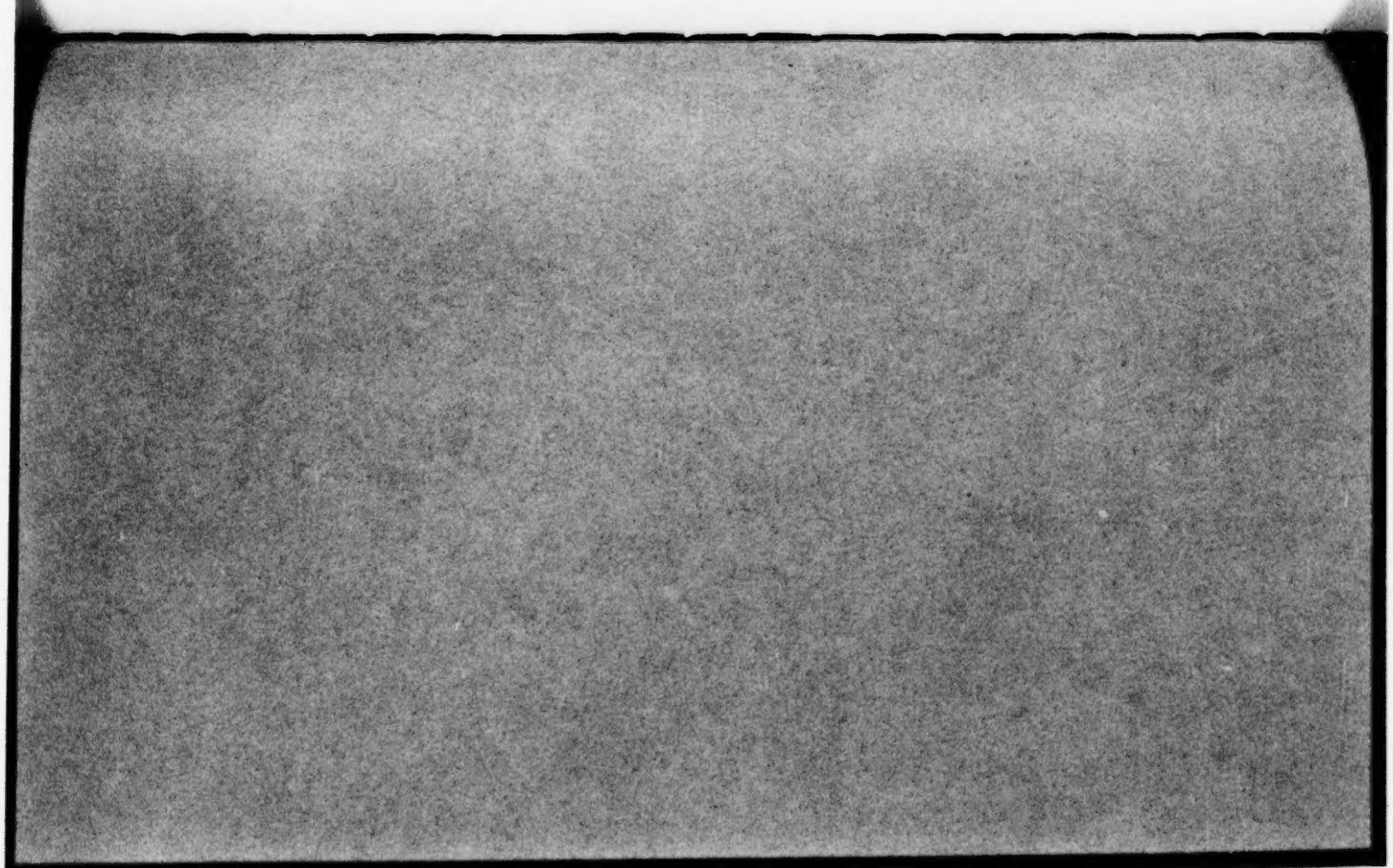
v.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY McLAUGHLIN,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR, INDUSTRIAL COMMISSION OF WISCONSIN

HERMAN L. EKERN,
Attorney General,

WINFIELD W. GILMAN,
Special Counsel,
Attorneys for Defendant in Error,
Industrial Commission of Wisconsin.



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Having now received a copy of the brief for the plaintiffs in error, we desire, very briefly, to supplement our main brief herein.

STATEMENT OF FACTS

In addition to the testimony referred to by plaintiffs in error, Constance Huen testified that he saw the deceased, William McLaughlin, the last evening he worked at the Booth Fisheries

Company plant; that he complained of being sick, and that "when I come out of that room there I have to be outside in the air." That was in room No. 1. That he found McLaughlin in the office (R. 15). On the following day McLaughlin told him he had been in No. 1 freezer, and that he fell down on his knees and he "came outside for a while and then he come in the office" (R. 17). The night before this happened McLaughlin "was just so good to me as I ever know him." He was as well as ever (R. 19).

Dr. Knox testified that he attended McLaughlin during his last illness (R. 20-21). The doctor described the condition in which he found McLaughlin (R. 21). From the history of the case and the symptoms, he figured McLaughlin had been affected with some accidental poisoning. The conditions he found were the ordinary symptoms of monoxide gas poisoning (R. 22). His diagnosis was that he was suffering from carbon monoxide poisoning (R. 24).

Albert Merrick testified that one of McLaughlin's duties was to watch the fires in the salamanders a little to see that nothing else was burning. There was a salamander in No. 1 freezer the night McLaughlin was injured and it was his duty to see that that fire was all right (R. 26).

Other evidence might be referred to also, but we see no good purpose to be served by so doing. We do not understand that there is any contention here that there was no substantial credible evidence to support the findings of the commission, but that plaintiffs in error are contending only that the court should have the power to weigh the evidence, and that in the absence of such power the statute contravenes the due process clause of the fourteenth amendment.

ARGUMENT

The Findings of the Commission Must be Supported by Evidence

Clear violations of law in reaching the result,

> "such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error and will justify reversal of the board's action, * * *."
>
> *Borgnis v. Falk Co.*, 147 Wis. 327, 360.

It is clearly outside the powers of the commission to find essential facts that have no support in the evidence.

> *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 175;
>
> *Bekkedal Lumber Co. v. Industrial Commission*, 168 Wis. 230, 233.

Every finding of fact made by the commission "must have some *substantial* evidence in its support, though not necessarily the preponderance of the evidence." (Italics ours.)

> *Voelz v. Industrial Commission*, 161 Wis. 240, 242;
>
> *Leszala v. Jazek*, 170 Wis. 532, 536;
>
> *Widell Co. v. Industrial Commission*, 190 Wis. 179, 183.

Their findings should not be disturbed "if there is a *substantial* basis for the decision." (Italics ours.)

> *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, 103.

To the same effect, see:

> *William Rahr Sons Co. v. Industrial Commission*, 166 Wis. 28, 31;

Wausau Lumber Co. v. Industrial Commission, 166 Wis. 204, 206.

If there is any *substantial, credible* evidence supporting the findings, the courts cannot interfere.

Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 251.

Thus it appears that under the Wisconsin Workmen's Compensation Law the Wisconsin supreme court has repeatedly held that each finding of material fact must be supported, not only by evidence, but by credible evidence. It has never held, and never will hold, that a finding made without evidence in its support can stand. If such a construction were put upon the law, very clearly, we think, it would render such law unconstitutional. The construction that has been put upon it does not.

The decisions of the Industrial Commission of Wisconsin, under the construction so given, do not, and cannot, rest upon favor or discretion any more than does the finding of a jury or a judge. Human nature is not infallible. But the power to decide questions of fact must rest somewhere, and it has never been held, so far as we are aware, that such power cannot be finally vested elsewhere than in a court.

The Commission Acts Quasi-Judicially

While the Industrial Commission is an administrative body, it "is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts *quasi*-judicially, but it is not thereby vested with judicial power in the constitutional sense."

Borgnis v. Falk Co., 147 Wis. 327, 358.

That such boards may be authorized to act *quasi*-judicially, by ascertaining certain questions of fact, is elemental.

The Powers Exercised Are Not Like Rate-Making Powers

In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, *Oklahoma Operating Co. v. Love*, 252 U. S. 331, and *Bluefield Co. v. Public Service Comm.*, 262 U. S. 679, the court had before it the attempted exercise of the rate-making power, clearly a legislative function. The Industrial Commission of Wisconsin does not attempt to exercise any similar power, and the law here attacked does not attempt to confer any such power upon it. The commission is limited to ascertaining and finding, upon substantial, credible evidence, the essential facts. The law itself prescribes what the compensation shall be upon those facts. If the commission makes any finding not based upon substantial, credible evidence, as we have shown, it thereby acts without or in excess of its powers, and its award "shall be set aside" under the express provisions of sec. 2394-19, Wisconsin Stats. 1921, sec. 102.23, Wisconsin Stats. 1925.

If its findings do not support the award made, the same result follows, under the provisions of that same section.

This affords as full and complete a judicial review as is required to constitute "due process of law."

All of which is respectfully submitted.

HERMAN L. EKERN,
Attorney General.

WINFIELD W. GILMAN,
Special Counsel,
Attorneys for Defendant in Error,
Industrial Commission of Wisconsin.

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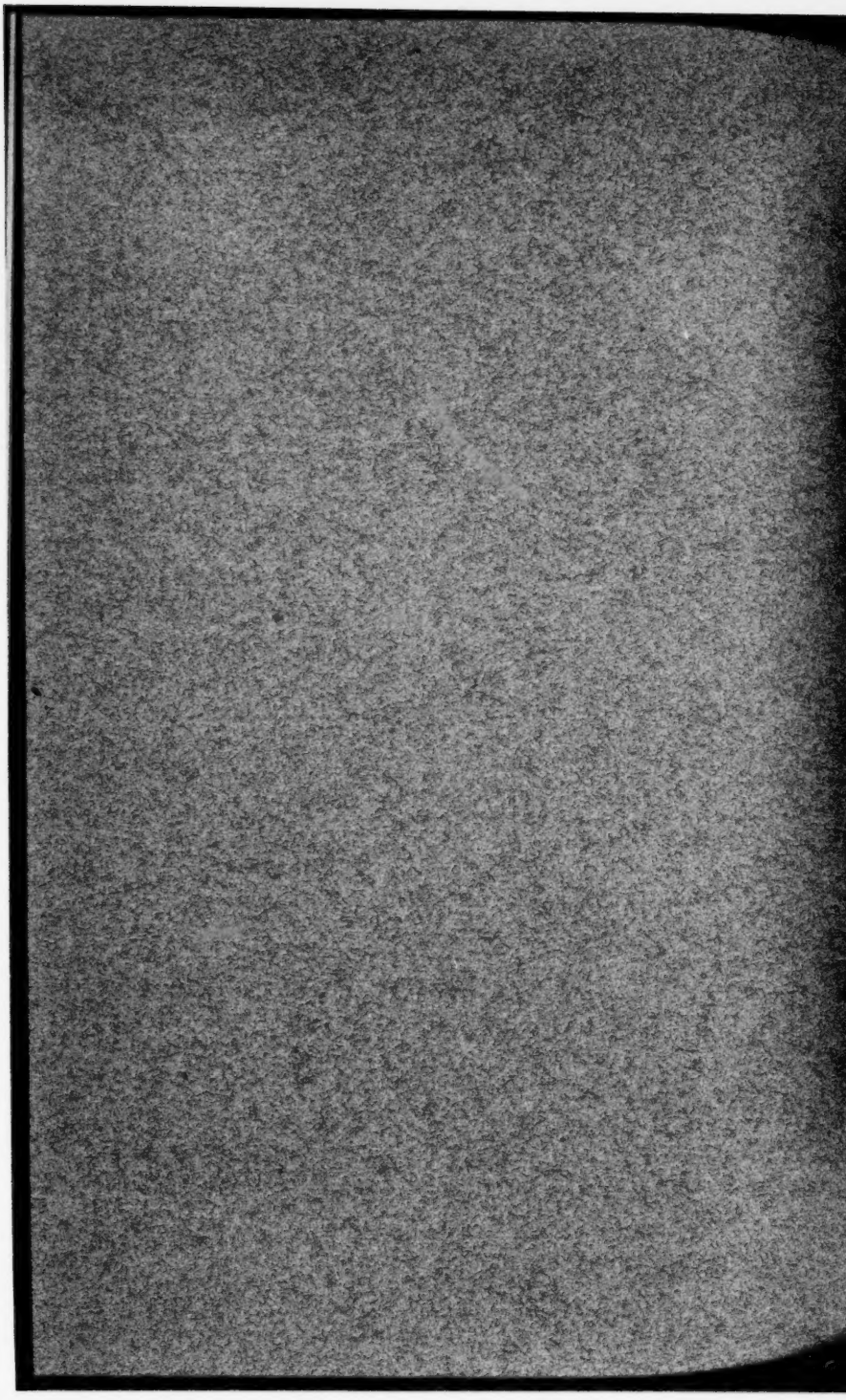
In Error to the Supreme Court of Wisconsin.
(30,949.)

BRIEF FOR DEFENDANT IN ERROR, MARY McLAUGHLIN.

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MARY McLAUGHLIN.

In Error to the Supreme Court of Wisconsin.
(30,949.)

BRIEF FOR DEFENDANT IN ERROR, MARY McLAUGHLIN.

STATEMENT OF CASE.

This was an action originally brought by the employer, Booth Fisheries Company, and its insurer, the Zurich Company, in circuit court for Dane county Wis-

consin (Rec., 9) to review an award of $4200.00 made by the Wisconsin Industrial Commission (Rec., 12) in favor of the defendant in error, Mary McLaughlin, and against said Booth Fisheries Company and Zurich Company under the Wisconsin Workmen's Compensation Act.

The award was based upon the accidental death of her husband, William McLaughlin, from monoxide gas poisoning while engaged in his work as night watchman for the Booth Fisheries Company at its Green Bay, Wisconsin, plant.

Inasmuch as the plaintiff in error attacks the sufficiency of the evidence to sustain the award, for the stated purpose of showing "on what kind of evidence an administrative body makes its decision in taking the property of an individual," we shall indulge in a somewhat more elaborate statement of the facts than seems really necessary.

It was shown by his foreman (Rec., 26) that McLaughlin was instructed to go into the freezer where a salamander was burning, for the purpose of seeing that it was all right. The salamander is a stove composed merely of a cast iron pipe with a coke fire in it, and without any means for carrying outside the generated gases (Rec., 28, 29). The room in which it was located, while having provision for ventilation by means of some twenty 8x4-inch openings at the top, had only two of these open on the night in question (Rec., 27).

The general superintendent, Jorgensen, after the report next morning that McLaughlin had been gassed, looked into the freezer in question (Rec., 29) and found gas there then (Rec., 30).

McLaughlin, although 77 years of age (Rec., 24), was hale and hearty, unusually sprightly, and apparently in the best of health to the day of his injury (Rec., 19, 24); had not touched liquor since 1880 (Rec., 25). He left home on the night of his injury as well as ever (Rec., 25), but was brought home by his coworker unable to speak. No one saw him enter the room containing the gas, but he was found by his coworker at about 4 a. m., lying in a chair at the office (Rec., 14) sick. He told this coworker at the time that he had been in No. 1, the cooler in question. Later he also told his wife he had been in there (C., 25) that his knees gave out as he came out and that he crawled around on his hands and knees.

While post mortem findings were testified to as claimed in the brief for plaintiff in error, Dr. E. S. Knox, who was called in to attend him at 6:00 a. m. the morning of his illness, testified that from the symptoms which he then found as well as from the history of the case, he diagnosed the case as monoxide gas poisoning (Rec., 22, 24).

Dr. Knox was familiar with such cases (Rec., 22) having specialized in gas poisoning during his overseas service during the war (Rec., 20).

Although the physician called by the insurance company on direct examination testified to findings inconsistent with monoxide poisoning, based chiefly on his post mortem, conducted with no representative of the widow present, his cross-examination entirely destroyed the effect of his testimony. Thus he had claimed that the absence of a cherry red color of the blood as shown by the post mortem two days after death negatived monoxide poisoning (Rec., 31), but admitted (Rec., 33)

that medical authorities stated only that it was generally but not always present after death (see also Rec., 37; Knox).

Again he claimed that albumen and granular casts indicated nephritis, or Bright's disease, as a cause of death (Rec., 33) and denied that they commonly accompanied monoxide poisoning. Dr. Knox later testified that they were present in all such cases (Rec., 37) as based on his war experience as well as medical authorities.

At first he hinted at death from fatty degeneration of the heart (Rec., 31), but on cross-examination admitted (Rec., 34) that that was inevitable from want of proper oxygenation in gas cases.

He attributed death to pneumonia, supported by his post mortem finding of pneumonia conditions (Rec., 34), denying that that would indicate carbon monoxide exposure. Yet he admitted that in any case an elderly man might develop pneumonia as a result of confinement to his bed for ten days (Rec., 35) independent of the original cause. McLaughlin lived 10 days after his exposure. The doctor further admitted that he couldn't say just when the pneumonia started (Rec., 35), and that he had found no evidence of it on his stethoscopic examination.

He further admitted that Billings was a recognized authority in toxicology (Rec., 34), and that at page 741 of Vol. 1, Billings stated that pneumonic changes are frequently observed in cases of monoxide poisoning.

He also admitted that he made a blood test during the life of the patient, which showed a deficiency of 30 per cent in the proportion of haemoglobin (Rec., 34)

which loss is exactly the condition due to the destruction of haemoglobin by chemical combination with monoxide gas (Rec., 31).

On this record, the commission found, as would any other intelligent trier of fact, that death resulted from the exposure to monoxide gas in the course of his employment and awarded compensation to the widow. The judgment of the circuit court for Dane county (Rec., 40) confirmed the award made by the Industrial Commission.

On appeal to the Supreme Court of Wisconsin, this judgment was affirmed (Rec., 41).

Both plaintiffs then brought this writ of error (Rec., 1) on the assignment of error (Rec., 6) that the Supreme Court of Wisconsin erred in upholding the constitutionality of the State Workmen's Compensation Act, Section 102.23, Wisconsin Statutes of 1921, because of an alleged lack of provision therein for a judicial finding of facts, claimed to constitute want of due process of law.

BRIEF.

I.

Due process of law is had by the hearings provided in the Wisconsin Compensation Act since it is appropriate to the case and just to the parties to be affected, and due notice of the hearings and an opportunity to be heard is given to all parties.

Section 2394-16; Section 2394-42; Wisconsin Statutes of 1921.

Twining v. New Jersey, 211 U. S., 78, at 110, 111.

Hagar v. Reclamation District, 111 U. S., 701.

Davidson v. New Orleans, 96 U. S., 97, 102.

Murray v. Hoboken Land Co., 18 How., 272.

Borgnis v. Falk Co., 147 Wis., 327, at 359.

Pruns v. Westine (Wis., Apr. 7, 1925), 203 N. W., 330; 204 N. W., 576.

II.

The Wisconsin Industrial Commission is a quasi judicial administrative body and in the making of findings of fact in specific compensation cases acts in such quasi judicial capacity so that findings so made are due process of law.

Wisconsin Statutes of 1921, Sections 2394-15 to Section 2394-42.

Ohio Valley Water Co. v. Ben Avonborough, 253 U. S., 287.

Prentiss v. Atlantic Coast Line Co., 211 U. S., 210.

Borgnis v. Falk Co., 147 Wis., 327.

Ekiu v. U. S., 142 U. S., 651.

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U. S. Ex Rel. v. Knox, 102 U. S., 423.

III.

The fact being that submission to the Wisconsin Compensation Act is voluntary, the individual affected cannot assert its unconstitutionality.

Borgnis v. Falk Co., 147 Wis., 327, at 350.

Carson v. Brockton, 182 U. S., 382, at 401, 402.

Hawkins v. Bleakly, 243 U. S., 210; 61 L. Ed., 678, 684.

New York C. R. Co. v. White, 243 U. S., 188.

Mountain Timber Co. v. Washington, 243 U. S., 219.

Ward & Gow v. Krinsky, 259 U. S., 503.

Middleton v. Texas Power & Light Co., 249 U. S., 152.

Arizona Copper Co. v. Hammer, 250 U. S., 400.

Madera Sugar Pine Co. v. Ind. Acc. Com. of Cal., 262 U. S., 499.

Cudahy Packing Co. v. Parramore, Sup. Ct. Rep., 153 (Jan. 15, 1925).

ARGUMENT.

I.

The Industrial Commission as constituted at the time of the initiation of this proceeding was in existence under the provisions of the *Wisconsin Statutes of 1921, Section 2394-42,* as follows:

> "There is hereby created a board which shall be known as the 'Industrial Commission of Wisconsin.' The governor, by and with the advice of the senate, shall appoint a member who shall serve two years, another who shall serve four years, and another who shall serve six years. Thereafter each member shall be appointed and confirmed for terms of six years each. Each member of the board shall take and file the official oath." * * *

By *Section 2394-15 of the Wisconsin Statutes of 1921,* it was enacted that:

(1) Any dispute or controversy concerning compensation under *Sections 2394-3 to 2394-31* inclusive, including any in which the state may be a party, shall be submitted to said industrial commission in the manner and with the effect provided in *Sections 2394-3* to *2394-31* inclusive. * * *

Section 2394-16 provided:

"(1) Upon the filing with the commission by any party in interest of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall mail a copy of such application to all other parties in interest and the insurance carrier shall be deemed a party in interest. The commission may bring in additional parties by service of a copy of the application. The commission shall fix a time for the hearing on such application which shall not be more than forty days after the filing of such application. The commission shall cause notice of such hearing, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the commission, and hearings may be held at such places as the commission shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the commission; but the commission may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and payroll of the employer to be examined by any member of the commission or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the commission, for its consideration upon final hearing All *ex parte* testimony taken by the commission shall be reduced to writing and either party

shall have opportunity to rebut the same on final hearing.

(2) If the commission shall have reason to believe that the liability of any party for the payment of the compensation provided by Sections 2394-3 to 2394-31, inclusive, shall not have been discharged, it may on its own motion give notice in writing to the parties, in the manner provided for the service of an application, of a time and place when formal inquiry will be had for the purpose of determining the facts. Such notice shall contain a concise statement of the matter to be considered. Thereafter all other provisions governing proceedings an application shall attach insofar as the same may be applicable. The commission shall make findings and award as provided in Section 2394-17 and to the same effect as it might have done in proceedings upon application of a party.

(3) The commission, or any member thereof, or any examiner appointed thereby shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers or records, and to administer oaths, hold hearings and take testimony."

(4) (Provides penalties for refusal to respond to subpoenas.)

(5) (Provides for compelling attendance and production of written evidence on order of circuit court.)

Section 2394-17 is as follows:

"After final hearing by said commission, it shall make and file (1) its findings upon all the facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the final determination of any controversy before it, the com-

mission shall have power after any hearing, to make interlocutory findings, orders and awards which may be enforced in the same manner as final awards. The commission shall have the power to include in its final award, as a penalty for noncompliance with any such interlocutory order or award, if it shall find that noncompliance was not in good faith, not exceeding twenty-five per cent of each amount which shall not have been paid as directed thereby.

The commission may on its own motion, modify or change its order, findings or award at any time within twenty days from the date thereof if it shall discover any mistake therein."

Section 2394-18 is as follows:

"Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a judgment in accordance therewith; which judgment, until and unless set aside as hereinafter provided shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed."

Section 2394-19 is as follows:

1. "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the

grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in Section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party to ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(1) That the commission acted without or in excess of its powers.

(2) That the order or award was procured by fraud.

(3) That the findings of fact by the commission do not support the order or award.

2. Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby."

• • •

Brief for plaintiff in error (pages 11-12) argues that this legislation permits the sustaining of an award by the commission though unsupported by evidence or credible evidence.

In *Borgnis v. Falk Co., 147 Wis., 327,* in construing these statutes for the purpose of passing upon their constitutionality, the court said (at pages 359, 360, 361):

> "The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. * * * It is important to notice the limitation contained in the last sentence; the decision of the board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; it cannot itself conclusively settle that question and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within its jurisdiction is always open to the examination and decision of the proper court by writ of *certiorari. In such cases it is considered that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error* and will justify reversal of the board's action, as well as the failure to take proper steps to acquire jurisdiction at the beginning of the proceeding. * * *
>
> If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implica-

tion, the contention that judicial power had been vested in the commission, contrary to the command of the constitution, would be of greater force, but we think that the act does not do this, or attempt to do it. * * *

With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man, without his consent can be brought under the law, or is deprived of his right to due process of law, thereby."

This construction of the law by the court of last resort of the state, conclusively answers the argument of counsel on this point.

As instances of the exercise of this power by the court, see:

Pruno v. Westine (Wis., April 7, 1925), 203 N. W., 330; 204 N. W., 576.

Lloyd-McAlpine Loggery Co. v. Whitefish (Wis., Jan. 12, 1926), 206 N. W., 914.

It is not necessary, in order to constitute due process of law that a regular proceeding be had in a court of justice or after the manner of such courts. It is only necessary that the determination made by an administrative body be upon due notice to and opportunity for hearing objections of the interested party whose property is to be taken.

Davidson v. New Orleans, 96 U. S., 97, 102.

Murray v. Hoboken Land Co., 18 How., 272.

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally pre-

scribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." (Citing many decisions.)

Twining v. New Jersey, 211 U. S., 78, at 110, 111.

Said Mr. Justice Field, in *Hagar v. Reclamation Dist., 111 U. S., 701:*

> * * * "By 'due process,' is meant one which, following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained; and *wherever it is necessary for the protection of the parties,* it must give them an opportunity to be heard respecting the justice of the judgment sought."

Courts may with reference to ascertainment of facts necessary to performance of administrative or executive acts be expressly deprived of jurisdiction to review such findings. Thus in dealing with congressional legislation touching the determination by inspection officers acting under the secretary of the treasury of facts necessary to rule upon exclusion or admission of Mongolian aliens, it has been held by this court that where the legislative body has conferred upon an executive or administrative officer or body, discretionary power * * * to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existency of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evi-

dence on which he acted. Such determination of fact is due process of law.

Ekiu v. U. S., 142 U. S., 651.
United States v. Ah Lung, 124 U. S., 621.
Li Sung v. U. S., 180 U. S., 486.
Lem Moon Sing v. U. S., 158 U. S., 538.
Fong Yue Ting v. U. S., 149 U. S., 698.
Wong Wing v. U. S., 163 U. S., 228.

See also as to findings of fact requisite to issue or reissue of a patent.

Philadelphia and Trenton R. R. Co. v. Stimpson, 39 U. S., 448.

A similar declaration has been made by this court relative to the right of a court of equity to control the action of the comptroller in levying assessments against national bank stockholders, otherwise by the statute made conclusive against such stockholders.

U. S. Ex Rel. v. Knox, 102 U. S., 423.

II.

It will be observed that the Wisconsin Compensation Act provides for a complete hearing of all questions of fact on due notice to the interested parties which affords them an opportunity to be heard before the determination of such facts. As to all matters arising under a claim to compensation under this act, the decisions of the commission relate purely to matters which have transpired and have no effect as a future regulation of conduct.

In this respect the functions of the commission differ fundamentally from those condemned by this court in the case of *Ohio Valley Water Company v. Ben Avon Borough, 253 U. S., 287,* relied upon by appellant in error.

That case followed the earlier decision in *Prentiss v. Atlantic Coast Line Co., 211 U. S., 210,* where it was held that the Virginia State Corporation Commission, though undoubtedly having judicial functions for some purposes, was acting in a legislative capacity in fixing future railroad rates and that it was therefore necessary that its functions in fixing such rates be open to judicial review to constitute due process of law.

In differentiating between the two functions the court by Mr. Justice Holmes declared (at page 226):

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be

applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future and therefore is an act legislative, not judicial in kind. * * *

Within this rule the commission acted in a quasi judicial capacity in determining the existence of the facts necessary to its awards in compensation cases. The entire proceeding here was according to the course of procedure applicable to a court and was clearly due process, within the definitions thereof laid down by this court.

The Industrial Commission is not a court, even within the broader definition of the term recognized by some authorities"

(15 C. J., 716.)

In *Borgnis v. Falk Co., 147 Wis., 327, at 388,* the Wisconsin court said:

"We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the (state) constitution. It is an administrative body or arm of the government which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts *quasi* judicially, but it is not thereby vested with judicial power in the constitutional sense."

Bushnell v. Leland, 164 U. S., 684; 17 Sup. Ct., 209.

Within the tests of due process as laid down in all of the decisions of this court, it is respectfully submitted that the proceedings before the Wisconsin Industrial Board and the provisions for judicial review thereof constitute due process of law.

III.

It would seem useless to add anything by way of argument to the very exhaustive opinions of the Supreme Court of Wisconsin covering the voluntary character of the submission by the parties in a compensation case to the operations of the law and its administration by the Industrial Commission.

> *Borgnis v. Falk Company, 147 Wis., 327, at 350.*
> *Opinion of Justice Owen, below (Rec., 44).*

As pointed out in the latter opinion, not only may a constitutional right be waived, but one may not enjoy the benefits of an act and then assert its unconstitutionality to escape its burdens.

This court has already passed on the constitutionality of similar legislation of other states and has sustained them in every instance where the element of voluntary submission thereto is present. In each case the objection of want of due process was raised although not in any instance directly questioning the want of a review of findings of fact. It will be noted that in the *Hawkins case* as well as *New York Central Ry. Co. v. White*, the opinions of the court refer to the facts that under the statutes considered there is no judicial review except of questions of law.

> *Hawkins v. Bleakly, 243 U. S., 210; 61 L. Ed., 678, 684.*
> *New York C. R. Co. v. White, 243 U. S., 188.*
> *Mountain Timber Co. v. Washington, 243 U. S., 219.*
> *Ward & Gow v. Krinsky, 259 U. S., 503.*

Middleton v. Texas Power & Light Co., 249 U. S., 152.

Arizona Copper Co. v. Hammer, 250 U. S., 400.

Madera Sugar Pine Co. v. Ind. Acc. Com. of Cal., 262 U. S., 499.

Cudahy Packing Co. v. Parramore, Sup. Ct. Rep., 153 (Jan. 15).

It is therefore respectfully submitted that the judgment of the Supreme Court of Wisconsin in this cause is right and should be affirmed.

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